No. 3835

7

United States Circuit Court of Appeals

For the Ninth Circuit.

EDWARD DONLAN and BEN W. HENDERSON, Co-partners, Doing Business Under the Firm Name and Style of DONLAN and HENDERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COMPANY, a Corporation, of Jackson County, Missouri,

Appellee.

Brief of Appellants.

HARRY H. PARSONS,
A. J. VIOLETTE,
GUNN, RASCH & HALL,
Solicitors and Attorneys for Appellants.

NAEGELE PRINTING CO., HELENA, MONT.

United States
Circuit Court of Appeals
For the Ninth Circuit.

EDWARD DONLAN and BEN W. HENDERSON, Co-partners, Doing Business Under the Firm Name and Style of DONLAN and HENDERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COMPANY, a Corporation, of Jackson County, Missouri,

Appellee.

Brief of Appellants.

STATEMENT OF THE CASE.

On the 16th day of April, 1920, the appellants contracted with the appellee for the sale of lumber owned by them in pile at their sawmill yard at Fletcher Spur, near Pablo, Montana, and all lumber thereafter to be sawed, cut and manufactured by

them at Fletcher Spur, until the first day of January, 1921. The appellee was to pay, as an advancement upon the purchase price, the sum of $20 per thousand feet on all lumber sold and then in piles at Fletcher Spur, in accordance with an inventory of such lumber agreed upon, and loan appellants $20,000 to be evidenced by appellants' promissory note. An advance of $20 per thousand feet was to be paid by the appellee on all lumber thereafter manufactured by appellants under and during the life of the contract, based upon an inventory of finished piles in the millyard at Fletcher Spur, on or before the 10th day of each month, one-half of such advances to be applied and credited on the note until paid. The lumber was to be graded according to Western Pine Manufacturers Association grading rules and standards, appellants to hold the appellee harmless against any claim or loss arising under said rules or standards, and deliver the lumber f. o. b. cars at Fletcher Spur, either dressed or rough, as directed and ordered by the appellee.

Upon payment of the advance of $20 per thousand feet, "the title and possession of such lumber" passed to the appellee and became its property, subject only to the payment of the purchase price "upon completion of the terms and conditions of this contract on the part of the vendors"; the appellants to give bills of sale for and possession of the lumber, and same was to be "marked and designed" as the property of the appellee "from the time it is so marked and bill of sale given." The

land upon which appellants' lumber yard was located was leased to the appellee for and during the life of the contract, subject to the right of appellants' occupancy and use for the purpose of the contract, and the appellee had the right to use appellants' planer to dress the lumber, in the event of appellants' failure to carry out the contract, in order to protect itself against loss on account of the advances made by it.

Appellants were required to keep all lumber sold and in the yard insured against loss by fire, at their own expense, for $25.00 per thousand feet, loss payable to appellee. The appellee was required to market and sell the lumber for the highest market price obtainable at the time of sale, and upon delivery of the lumber on cars, pay appellants, as the purchase price for said lumber, the highest market price for which it was sold, less 15%, and an additional 2% trade discount, and the $20.00 per thousand feet advanced by the appellee upon the purchase price (Tr. pp. 15 to 18).

Two million feet of lumber was in the yard at the time the contract was made, and on the same day the appellants executed and delivered to the appellee a bill of sale for that amount (Tr. pp. 135 to 136). Thereafter and prior to August 3rd, 1920, an additional 1,338,412 feet of lumber was manufactured and piled in the lumber yard, according to contract requirements, for which bills of sale were delivered to the appellee, and the lumber marked and stenciled with appellee's name (Tr. pp. 137 to 139).

All of it with the exception of some 322,000 feet, which had been shipped upon orders from the appellee, was destroyed by fire on August 3rd, 1920. Something over 1,600,000 feet of lumber was manufactured and piled in the yard subsequent to the fire and before the institution of this action, and recovery of its value was also sought in this suit, but the questions raised and presented for determination by this court upon this appeal, do not require any particular reference to the dealings between the parties subsequent to August 3rd, 1920. Aside from the appellants' claim of the amount due them for lumber manufactured, piled and marked, and transferred by bills of sale to the appellee, pursuant to the terms of the contract prior to the commencement of the action, and the counter-claims of appellee for moneys loaned and advanced, the principal controverted issue litigated in the trial court was the nature and character of the transaction between the parties culminating in the making of the contract of April 16th, 1920. The appellants based their right to recover upon the ground that the contract, together with the bills of sale given appellee when the lumber had been piled and marked, effected an absolute sale and transfer of the title entitling them to recover the market value of the lumber destroyed, less advances made on the purchase price and the percentages provided by the contract; the appellee contended that the contract, as drawn and executed, did not express the intentions and understanding of the parties, but that under the terms

of the agreement actually made, the appellee should simply take over and handle the lumber as appellants' representative, in the capacity of sales agent, and the bills of sale were to be given and received simply "as security and as evidence of a factor's lien" (Tr. pp. 30 to 44).

The trial court rejected the appellee's contention and found and held that the contract was one of sale and had "only enough of the *indicia* of agency to give some color to a claim of the latter"; that the parties intended and accomplished a sale of the lumber, and that upon payment of the $20.00 per thousand feet, the absolute property in lumber and money, respectively, vested in appellee and appellants, beyond return, recall or repayment, and that thereafter the appellants had no interest in the lumber save that it be resold for the purposes of the contract, such resale to be according to appellee's "judgment of time, place, person, price, and terms," but within a reasonable time, and for the highest reasonably obtainable price. That by the destruction of the lumber the appellee lost its investments and its prospective profits, and appellants lost whatever they might have been entitled to upon a resale of the lumber by the appellee under the contract, the appellee's promise to pay not being absolute but conditional, and appellants' right to payment not vested but contingent (Tr. pp. 117 to 118). Upon appellee's counter-claims the court found that there was due from appellants the sum of $18,048.51, with interest, and judgment and decree dismissing the

appellants' complaint and causes of action, and awarding appellee $18,221.17, was rendered on September 21, 1921 (Tr. pp. 125 to 126), from which the appellants appeal to this court.

ASSIGNMENT OF ERRORS.

1. The court erred in rendering and entering judgment and decree in favor of the appellee and against the appellants.

2. The court erred in holding and decreeing that the appellants were not entitled to recover anything upon their complaint, and that the said complaint, and the causes of action therein stated, should be dismissed.

3. The court erred in holding and deciding that appellants' right to any sum or amount in excess of the $20 per thousand feet advanced for the lumber burnt on August 3rd, 1920, depended upon a resale of said lumber, and that before such resale no money was due from the appellee and no debt existed.

4. The court erred in holding and deciding that the appellee's promise to pay for the lumber which was burned on the 3rd day of August, 1920, was not absolute, but conditional, and that the appellants' right to payment therefor was not vested, but contingent, and in that connection the court erred in holding and deciding that by the destruction of said

lumber the condition of appellee's liability failed, and the contingency upon which such liability of appellee depended did not happen, and that by reason thereof, both the promise of the appellee and the right of the appellants thereupon expired.

5. The court erred in holding and deciding that on the sale of the lumber by appellants to appellee, the appellants and appellee were and became joint adventurers in respect to any return on a resale thereof by the appellee; and in that connection the court erred in holding and deciding that the obligations and liabilities of the appellee to appellants ceased and became extinct upon the happening of the fire and the destruction of the lumber on the 3rd day of August, 1920.

ARGUMENT.

Appellants' several assignments of error are all based upon what we conceive to be an erroneous application by the learned Judge of the trial court of certain principles of law which have no bearing or determinative force in this case. The law invoked by the court is that governing in cases of executory contracts, but when the court found and held that the parties intended and accomplished a sale, effecting a complete and unconditional transfer of title to the lumber from appellants to appellee, the liability of the appellee became then and there also irretrievably fixed. In Williston on Sales, par-

agraph 301, the applicable rule, and the manner of its establishment, is stated as follows:

> "It was early assumed without discussion that the maxim *res perit domino* was of universal application, and this assumption has sufficed to fix the law."

And in a note, subjoined to the above quoted text, the author says:

> "In *Rugg v. Minett,* 11 East 210, it was taken for granted that risk attends title, and the only discussion related to the question whether the title had in fact passed. So clear is the law that it is hardly formally stated by so acute a writer as Benjamin. The only statement he makes is a casual one without citation of authorities in ¶308."

But even if, as to some of its provisions, the contract of April 16th, 1920, remained executory at the time of the destruction of the lumber on August 3rd, 1920, that fact did not operate to leave with or impose upon the appellants, the risk of loss of any of the lumber burnt. The very authorities referred to by the learned trial Judge as sustaining the propositions upon which his conclusions are based, are squarely opposed to the inferences, as to their import, which are attempted to be drawn therefrom. Thus, the continued existence of the subject matter of the contract may only be implied, as a condition of performance, when the circumstances or the event which rendered performance impossible "*were not*

contemplated when the contract was made."

7 Halsbury, Laws of England, page 430.

The appellee's undertaking to sell the lumber as required by the contract was not a mere conditional promise depending for its fulfillment upon future contingency, as held by the trial court, but it was a part of the very consideration of the contract and imposed upon the appellee an absolute and unqualified obligation subject to no limitations or exceptions whatsoever. As expressed in the contract, the appellee

> "shall market and sell said lumber for the highest market price obtainable at the time of making such sale,"

and to give the words used a meaning such as is attributed to them by the trial court, would require the interpolation of a proviso making the obligation to sell dependent upon the existence of the lumber at such time as the appellee should choose to dispose of it. There is, in fact, nothing left to chance or eventuality in the consummation of the object of the contract, except *the amount* of the purchase price to which the appellants should ultimately be entitled.

We invoke, again, the authority relied upon by the learned trial Judge for the applicable rule to a situation of that kind:

> "A party who has made an absolute promise is not discharged from liability if it afterward

appears that it is impossible for him to perform the contract, even though this is not due to any default on his part. It is his own fault if he runs the risk of undertaking to perform an impossibility. * * * * Even if the impossibility is caused by what is called the act of God, the promisor is not in such case excused from performing his promise. The ordinary rule is that, where *the law creates a duty,* and the person on whom it is imposed is disabled from performing it without any default of his own, by the act of God or the King's enemies, the law will excuse him; but when a person *by his own contract* unconditionally undertakes a duty, he is bound to perform it or take the consequences, notwithstanding any accident by inevitable necessity." (Italics ours.)

7 Halsbury, Laws of England, pages 427 to 428.

As pointed out in Halsbury's Laws of England, the implied condition in executory contracts of the existence of the subject matter of the contract at the time of performance cannot be supplied by judicial construction, unless the event rendering performance impossible was not within the contemplation of the parties at the time the contract was made. But here, not only was the loss which might occur in the grading of the lumber according to Western Pine Manufacturers' Association grading rules and standards provided for, but the possibility of the destruction of the lumber by fire was contemplated by the parties at the time the contract was made,

and precautionary measures taken to guard against and mitigate the loss if that possibiliy should materialize. "The vendors," says the contract, "shall at their own expense and during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for $25 per thousand feet, the loss thereon to be made payable to the vendees" (Tr. p. 18). Hence, the rule, invoked by reference in the trial court's decision to 13 Corpus Juris, on page 643, is by the exceptions to the rule, enumerated and stated on the next succeeding page of the authority cited, conclusively shown to be wholly inapplicable here. In 13 Corpus Juris, subject "Contracts," page 644, the exceptions to the rule are given as follows:

> "Exceptions. The rule just stated has been held to have no application to a case where the thing destroyed is the thing which one of the parties has expressly contracted to produce by manufacture or otherwise. *Nor to a contingency reasonably to be anticipated,* such as the impossibility to perform a subcontract where the principal contract is terminated according to the provisions." (Italics ours.)

In fact, that intervening casualty, rendering performance impossible, does not excuse a failure to perform when the event could have been anticipated, had already been announced at page 639 of the text, where it is said:

> "So where a subsequent impossibility of per-

> formance might have been foreseen by the promissor and he chooses to bind himself absolutely, he is not excused,"

and this is followed with a statement of the general rule, supported by a cloud of cited cases, that:

> "Where performance becomes impossible *subsequent to the contract,* the general rule is that the promisor is not therefore discharged." (Italics ours.)
>
> 13 Corpus Juris, subject "Contracts," ¶¶711 and 712, page 639.

In Jones v. United States, 96 U. S. 24, 24 L. Ed. 644, the fact that the event which made performance of the contract to sell and deliver impossible, was not foreseen, was held to be no excuse for failure to perform. There the court said:

> "Impossible conditions cannot be performed; and if a person contracts to do what at the time is absolutely impossible, the contract will not bind him, because no man can be obliged to perform an impossibility; but where the contract is to do a thing which is possible in itself, the performance is not excused by the occurrence of an inevitable accident or other contingency, although it was not foreseen by the party, nor was within his control."

In C., M. & St. P. Ry. Co. v. Hoyt, 149 U. S. 1, 37 L. Ed. 624, the same principle was announced, the court saying:

> "There can be no question that a party may by an absolute contract bind himself or itself to perform things which subsequently become impossible, or pay damages for the non-performance, and such construction is to be put upon an unqualified undertaking, *where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor.*" (Italics ours.)

And in Berg vs. Erickson (C. C. A.) 234 Fed. 817, Judge Sanborn, after a review of the authorities, states the rule "adopted by the Supreme Court, which must prevail here," and says:

> "It is that, although general words, which cannot be reasonably supposed to have been used with reference to the possibility of an event, may not be held to bind one, yet, where one, at the time of making his contract, must have known or *could have reasonably anticipated, and in his contract could have guarded against,* the possible happening of the event causing the impossibility of his performance, and nevertheless he makes an unqualified undertaking to perform, he must do so or pay the damages for his failure." (Italics ours.)

In Mitchell vs. Weston (Miss.), 45 So. 571, 15 L. R. A. (N. S.) 833, the contract required the keeping of a bridge in repair, and to rebuild it in the event of its destruction or removal "from any cause, fire excepted." The bridge was destroyed by an unprecedented flood—an act of God. In holding

the defendant liable upon the contract for the rebuilding of the bridge, the court said:

> *"It is obvious that the obligator's attention was directed to exceptions which should be made and that the only thing excepted against was loss by fire. Whilst making his exceptions, if he had intended to except against the act of God, he should have done so."* (Italics ours.)

And so, Judge Sanderson, speaking for the court in Polack vs. Pioche, 35 Cal. 416:

> "A general covenant to repair is binding upon the tenant under all circumstances. If the injury proceeds from the act of a stranger, from storms, floods, lightning, accidental fire, or public enemies, he is as much bound to repair as if it came from his own voluntary act. Such has been the settled rule since the time of Edward III. (2 Platt on Leases, 186, 187, and cases there cited.) If the tenant desires to relieve himself from liability for injuries resulting from any of the causes above enumerated, or from any other cause whatever, *he must take care to except them from the operation of his covenant.* Id. 186, 187. So the defendant in the present case is liable, unless, in the language of the exception contained in his covenant, the damages were caused by 'the elements or the acts of Providence.'" (Italics ours.)

To the same effect:

> *Moxham v. Sherwood Co.* (C. C. A.), 267 Fed. 781.

II.

The cases above cited and referred to deal with executory contracts and their construction in the determination of the rights and obligations of the contracting parties in the event of impossibility of performance because of intervening accidental causes. The question of sale and transfer of title was not involved or presented in any of them, the risk of meeting the requirements of the particular duties imposed being dependent upon the terms of the contract permitting or barring the introduction of conditions by implication excusing performance when rendered impossible. But rules of construction cannot be resorted to for the creation of implied conditions to release one from the obligation of performance, or the payment of the purchase price, where there is a sale and title has passed. The distinction between the rules which control in cases of that kind, and those which may be applied, in exoneration of contractual requirements, if the circumstances of the case permit, in cases of executory contracts where title has not passed, or where th question of title is in no way involved, is adverted to, though the applicable rule is not distinctly stated, in a Case Note in 12 American Law Reports, at page 1280, where the author says:

> "The question as to who must bear the loss on the destruction of a chattel which is the subject of the sale may depend, evidently, on the question whether the title has passed to the

buyer. And, of course, this question is not treated in the present annotation, which deals with the question arising only on the assumption *that the title has not passed.* Strictly speaking, the question of liability for damages for non-performance of a sales contract, due to intervening impossibility of performance, *arises only when the seller is sued for damages for* failure to deliver a specific chattel which he has agreed to sell, but which has been destroyed since the making of the contract *and before title has passed.* If the action is by the seller against the buyer for the purchase price, *the question is not strictly one of impossibility of performance as regards the defendant.*" (Italics ours.)

The fact of the matter is, it is not at all a question of impossibility of performance in any sense, in the absence of contractual provisions placing the risk elsewhere than where the law puts it, and that is,—upon the holder and owner of the title. As stated in Williston on Sales, *supra,* the maximum *res perit domino* is of universal application and admits of no exceptions, save such as have been specifically and expressly reserved. The risk of loss, and the responsibility to make good that loss, abides with and follows the title, and this does not merely mean the risk of the buyer's own loss, but the risk of loss by reason of non-compliance with, or non-performance of, every obligation which the contract imposes, whether it be one for the payment of money, or the doing of something else.

As was said in Ingle vs. Jones, 2 Wallace 1, 17 L. Ed. 762:

> "The principle, which controlled the decision of the cases referred to, rests upon a solid foundation of reason and justice. It regards the sanctity of contracts. It requires parties to do what they have agreed to do. If unexpected impediments lie in the way, and a loss must ensue, *it leaves the loss where the contract places it. If the parties have made no provision for a dispensation, the rule of law gives none.* It does not allow a contract fairly made to be annulled, and it does not permit *to be interpolated what the parties themselves have not stipulated.*" (Italics ours.)

How utterly inconsequential the continued existence or the non-existence of the subject matter of the sale is with reference to the question of liability for the payment of the purchase price is pointedly exhibited in the Kentucky case of Sweeney vs. Owsley, 14B. Mon. 413, and in the Indiana case of Henlin vs. Hall, 4 Ind. 189, each decided the same way upon identical facts. In Sweeney vs. Owsley, the defendant Owsley purchased from the plaintiff a mule colt at the price of $57.50, paying $5 down on the purchase price when the bargain was made. Nothing was said or stipulated as to the time of payment of the remainder, but the colt was to stay with the mare, its mother, until it was weaned. Before that had been done, and before delivery of the colt, it died, and the action was for the recovery of

the unpaid balance of the purchase price. In holding that the defendant was liable, the court said:

> "So soon as a bargain of sale of specific personal property is struck, *the contract becomes absolute,* without actual payment or delivery, *and the property and the risk of accident to it, is in the buyer.* * * *
>
> "If in the purchase of articles which from necessity or convenience are permitted to remain in the possession of the vendor, and the vendee wishes to avoid payment in case the property should perish before the time of delivery, *he should stipulate to that effect.*" (Italics ours.)

Indeed, there is no room for construction, nor for inquiry regarding the question of liability for the payment of the purchase price in the event of the destruction of the property sold, where, as in the case at bar, the title is transferred to and vested in the purchaser by the very terms of the contract. As was said in Hatch v. Standard Oil Co., 100 U. S. 124, 25 L. Ed. 554:

> "Where it appears that there has been a complete delivery of the property in accordance with the terms of a sale, the title passes, although there remains something to be done in order to ascertain the *total value of the goods at the rate specified in the contract.*" (Citing cases.)
>
> "*Beyond controversy,* such must be the rule

in this case, *because the contract provides* that upon the piling and cutting of the staves as required by the instrument, the delivery of the same shall be deemed complete, *and that the staves shall then become and henceforth be, the property of the plaintiffs absolutely and unconditional.*" (Italics ours.)

And as was said by this court, in stating the rule of liability in cases of this kind, in Noyes vs. Marlott (C. C. A.) 156 Fed. 753:

> "Accident was hardly contemplated; but, when it occurred, by the rules of law, *the owner must be the sufferer.*" (Italics ours.)

To the same effect:

Standard Oil Co. vs. Van Etten, 107 U. S. 325, 27 L. Ed. 319;

Leonard vs. Davis, 1 Black 476, 17 L. Ed. 222;

The Elgee Cotton Cases (U. S. vs. Woodruff), 22 Wallace 180, 22 L. Ed. 863;

25 Halsbury, Laws of England, page 188;

1 Mechem on Sales, paragraph 483.

III.

At the time of the making of the contract on April 16th, 1920, two million feet of lumber was stacked and piled ready for the market in the yard

at Fletcher Spur. It had been purchased by the appellants, together with timber not yet manufactured into lumber, from Major Smead at a price of $35 per thousand feet (Tr. pp. 143, 150). It was transferred to the appellee on the same day, vesting in it a title "absolute, beyond return or recall." The transfer was subject to no condition or limitation, except the obligation on the part of the appellee to sell, according to its own untrammeled judgment as to "time, place, price and terms" of sale, "for the highest market price obtainable at the time of making such sale" (Tr. p. 117). Appellants were to load and ship the lumber when ordered, and although requests for orders were made by them as early as May 8th, 1922, and possibly earlier (Tr. p. 217), and such requests were repeated from that time on at frequent intervals (Tr. pp. 219, 221), no orders were given or received until more than two months after the making of the contract and the transfer of the lumber to the appellee (Tr. p. 220). The appellee expressed its satisfaction in knowing from appellants' letters of June 16th and 18th, respectively, that appellants were "disposed" to leave the matter of sales in appellee's hands, assuring the appellants that it had appellants' interests at heart as much as its own (Tr. p. 222). Meanwhile the lumber market was good; as stated by Mr. Lanning, Sales Manager for Polleys Lumber Company, it was "stiff" from April until October 1920, "absorbing all that the buyers could get." The demand, he says, was fully equal to the supply, and it would not

have taken him "over 30 days" to sell the lumber piled and stacked at Fletcher Spur, at a price of $51.51 per thousand feet f. o. b. Fletcher Spur (Tr. p. 170 to 172). Other experienced lumbermen testified substantially to the same effect (Tr. p. 182).

The learned trial Judge apparently assumed that the obligation on the part of the appellee to sell the lumber was a conditional one because the amount of the purchase price to which the appellants would be entitled was contingent. But the time when, the price for which, and the terms upon which a sale might and should be made was a matter depending upon no conditions whatever. It was, on the contrary, a matter committed absolutely to the will and wishes of the appellee, untrammelled by any restrictions in doing what its judgment in that regard should dictate. It chose and elected to hold the lumber waiting for a more profitable market, but in doing so it took upon itself the risk of loss, and the liability to pay what would have been realized if a sale had been made before the destruction of the lumber. As was said in Booth vs. Spuyten, Etc., Rolling Mill Company, 60 New York, on page 491:

> "The contract was made December twenty-seventh and the steel caps were to be delivered on the first day of April thereafter, The mill burned on the tenth day of March; and the proper construction of the finding is, that the defendant was prevented, after that time, from completing the contract, but there was ample

> time, prior to that event, to have manufactured the caps. A party cannot postpone the performance of such a contract to the last moment and then interpose an accident to excuse it. *The defendant took the responsibility of the delay.*" (Italics ours.)

The mere fact that the price to be paid to the appellants was made to depend upon market conditions, and a resale became impossible, does not defeat or impair appellants' right of recovery. As stated in Mr. Freeman's Note to the case of Tufts vs. Griffin, 22 Am. St. R. on page 866:

> "Or where goods are sold and delivered, to be paid for on the happening of some event, the vendor may recover though the event on which payment is made to depend has been made impossible by the happening of an accident. Thus, where all the wood standing upon a certain lot was purchased at so much per cord, to be cut and hauled, by the purchaser, measured in his yard and paid for after measurement, and after a part of the wood had been cut and hauled, a large part remained on the land, and was there burnt, the court decided that the sale was complete, and that the seller could recover the price of the wood burnt, upon proof of its quantity."

Citing:

> *Upson vs. Holmes,* 51 Conn. 500.

In Neally vs. Wilhelm (Iowa), 61 Am. Dec. 118, plaintiff had been negotiating for the sale of a cow to the defendants, the latter agreeing to go and see the

cow, which was not done. Defendants then directed plaintiff to deliver the cow to their slaughter-house, and agreed to pay as much for her as though they had previously seen her, and she was accordingly delivered. Defendant vendees, not finding her as good as expected, ordered the cow turned out and she was lost. In holding the defendants liable for the reasonable value of the cow, the court said:

> "The agreement with Neally's agent was unconditional. He was to deliver the cow to defendants, or their man, at their slaughter-house, and they would pay as much for her as though they had personally seen her. The cow was delivered accordingly into their possession, and thereupon they became liable for the cow. * * *
>
> "The price was dependent upon the condition of the cow; the sale was not. The delivery and sale were unconditional and the price conditional."

As in the Wisconsin case of McConnell vs. Hughes, 29 Wis. 537, so does the contract here furnish "a criterion for ascertaining the price" to be paid. There the price to be paid plaintiff for wheat which he had sold to defendants was "*ten cents per bushel less than the Milwaukee price on any day thereafter,*" which the plaintiff should name. After delivery of the wheat, but before the naming of the day for determining the price, the wheat was burned. It was delivered on February 7th, 1870, it was burned and destroyed on March 11th, and

thereafter the plaintiff named the 24th day of March, 1870, as the day fixing the price of the wheat. In holding the vendees liable for the Milwaukee market price of wheat on the day named by the plaintiff, the court said:

> "But it is urged on behalf of the defendants that the transaction was invalid as a sale, because the contract did not limit the plaintiff to the selection of any particular day, or of a day within a specified time, on which the market price of wheat in Milwaukee should control the price of the wheat in question, but left him the option to select any day in the future for the purpose of fixing the price.
>
> "The contract furnishes a criterion for ascertaining the price of the wheat; leaving nothing in relation thereto for further negotiation between the parties. *This is all that the law requires.* Story on Sales, 220. No case has been cited, and we are unable to find one, which holds that it is essential to the validity of a sale in such cases that the criterion agreed upon should, by the terms of the contract of sale, be applied, and the price thereby determined, on any specified day or within a specified time. Judge Story, in the section of his treatise above cited, evidently does not intend to lay down any such rule. It may be that, if the plaintiff had delayed unreasonably to make such selection after being requested to make the same, he might be compelled to do so. But we do not decide this point." (Italics ours.)

The applicable rule in cases of this kind is stated with admirable precision in a Case Note in 19 L. R. A. (N. S.) pp. 198-199, where the author says:

> "As has been before stated, most of the decisions regard as immaterial the impossibility of ascertaining the exact price *in accordance with the terms of the contract.* These authorities make the right of the seller depend *upon the fact of ownership of the destroyed goods. If the title has passed to the buyer, the risk has also become his.* Therefore, when a seller seeks to recover the price of goods which have been delivered to the buyer, but which have been destroyed before the quantity has been ascertained and the price fixed, it is incumbent upon the seller to show that he has parted with the ownership of the goods."

And that is the rule which is applicable and controlling here. As was held in Leonard vs. Davis, 1 Black 476, 17 L. Ed. 222:

> "When the terms of sale are agreed on, and the bargain is struck and everything the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties without actual payment or delivery; *and the property and the risk of accident to the goods vests in the buyer.*" (Italics ours.)

In 25 Halsbury, Laws of England, page 147, paragraph 270, the rule is stated as follows:

> "Where the ascertainment of the price depends upon the goods being weighed, measured,

> tested, or counted, *or upon some other act or thing being done to or in relation thereto*, and such act has become impossible by the perishing of the goods, the buyer, if liable to pay the price, must pay a sum reasonably estimated."

That the impossibility of ascertaining and fixing the price of personal property sold, in accordance with the contract provisions, does not preclude a recovery if a criterion for its ascertainment is available, is settled law everywhere. Thus in Standard Oil Company v. Van Etten, 107 U. S. 325, 27 L. Ed. 319, the Court said:

> "And as the risk follows the title, any loss that subsequently occurred, by non-delivery on the part of the carrier, would be the loss of the defendant below; and the plaintiff would be entitled to recover the contract price, on proof of the quantity of single pieces reduced to matched headings, delivered at Lapeer upon the best evidence that could be adduced under such circumstances, *although they could not be actually counted and matched at Cleveland, as required by the terms of the contract.*" (Italics ours.)

And, as was said by Judge Wolverton in Wadhams & Co. vs. Balfour (Ore.), 51 Pac. on page 647:

> "In this case, by the passing of title, *the condition became a condition subsequent;* and the property having been lost, the opportunity for examination and acceptance has become impossible; but, the title having passed, the loss must

fall upon those with whom it vests, and hence the duty to pay for that which has been lost." (Italics ours.)

Here, the same as in Noyes vs. Marlott (C. C. A.), 156 Fed. 753, the thing to be done for the ascertainment of the price to be paid was committed to the vendee; here, by a sale of the lumber at the highest market price obtainable; there, by a scale of the logs before their removal from the boom, "*and not otherwise.*" In both cases the means provided for the fixing of the purchase price failed because of the loss of the logs in one case and the destruction of the lumber in the other. In stating the contentions of the parties as to the nature of the transaction, and holding that it was a sale passing the ownership of the logs to the vendee, Judge Hunt, speaking of the right to recover, although the contract means for the ascertainment of the value of the logs had been rendered impossible, said:

"Defendants in error contended that they performed all of the acts required of them in the contract; that they put in the slough and boom designated in the contract the number, kind, and character of logs specified; that nothing was left for them to do; that the plaintiff in error was to remove the logs from the slough and to scale them, *but that this was merely a means of determining the amount of compensation due to defendants in error for the logs;* and that as delivery had been made as required, title to the logs passed to plaintiff in error,

hence that the peril to which the logs were exposed was plaintiff's. * * *

"An ascertainment of the amount *to be due* was contemplated, but the loggers *only undertook* to deliver the quantity and kind of logs that they proved were put into the slough, as designated in the contract. Referring to the language of the contract, it will be observed that the loggers were 'to fell, cut, raft, drive and deliver' logs of certain dimensions and quality as specified. They did all these things and transferred complete title, possession and control to Noyes. * * *

"Stress is laid by plaintiff in error upon the words '*and not otherwise,*' which conclude the provision of the contract defining the obligation of Noyes. *But this phrase only emphasizes the immediately previously fixed and limited method of ascertaining a settlement of accounts. No other method was to be allowed.* We do not think it can be regarded *as qualifying the sale itself by making it conditional upon Noyes hauling the logs out and scaling them.* In trusting to Noyes to ascertain the quantity of logs for which he was to pay, the loggers displayed confidence in him, *but the sale was not affected,* for the sellers had nothing to do to put the logs into deliverable shape. It had been completely delivered." (Italics ours.)

Then, after quoting from Macomber vs. Parker, 13 Pick (Mass.) 183, to the effect that where a sale of personal property is actually made and title is transferred to the vendee,

> "the weighing, measuring, or cutting afterwards would not be considered as *any part of the contract of sale,* but could be taken to refer to the adjustment of the final settlement as to the price," (Italics ours.)

the learned Judge concludes as follows:

> "In conclusion, we believe that the proper construction of the contract is that the parties intended that Noyes should become the owner of the logs when actually delivered into the slough, and that, from the time of delivery so made, he was the owner and could have recovered the property, had it been attached under writ issued in an action brought by a creditor of the loggers. *Accident was hardly contemplated; but, when it occurred, by the rules of law the owner must be the sufferer."* (Italics ours.)

This is decisive of appellants' right to recover. What the measure of that recovery should be depends upon the evidence adduced at the trial, and is a question for the determination of the trial court. There is a conflict in the testimony upon the question of the market value of the lumber, but according to the witnesses who testified on behalf of the appellants upon that issue, the amount sued for in the complaint is far below that to which the appellants would be entitled. At or near the close of the trial of the case, an amended complaint was offered and submitted, and leave asked for its filing, increasing the amount of the market value of the

lumber sold from $149,447.22, as stated in the complaint, to $170,502.87, and the amount for which judgment was asked from $60,000 to $85,054.47. But as, under the courts' view of the facts of the case, and its conception of the law applicable thereto, the appellants were held not to be entitled to any amount, the application for the filing of the amended complaint was not acted upon. It is clear, however, that the courts' application of inapplicable law was prejudicial error, and the case should be reversed and remanded.

Respectfully submitted,

HARRY H. PARSONS,
A. J. VIOLETTE,
GUNN, RASCH & HALL,

Solicitors and Attorneys for Appellants.